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Nos. 885 and 889

# In the Supreme Court of the United States

OCTOBER TERM, 1958

OWENSBORO ON THE AIR, INC., AND OWENSBORO PUBLISHING COMPANY, PETITIONERS

*v.*

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

DOUGLAS H. McDONALD, TRUSTEE, PETITIONER

*v.*

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, ET AL.

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION


J. LEE RANKIN,
*Solicitor General,*

ROBERT A. BICKS,
*Acting Assistant Attorney General,*

RICHARD A. SOLOMON,
*Attorney,*
*Department of Justice, Washington 25, D. C.*

JOHN L. FITZGERALD,
*General Counsel,*

MAX D. PAGLIN,
*Assistant General Counsel,*

RUTH V. REXI,
*Counsel,*
*Federal Communications Commission, Washington 25, D. C.*

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| Argument | 10 |
| Conclusion | 13 |


## CITATIONS

Cases:


| | |
|---|---|
| *American Trucking Associations* v. *United States*, 344 U.S. 298 | 13 |
| *City of Dallas* v. *Civil Aeronautics Board*, 221 F. 2d 501, certiorari denied, 348 U.S. 914 | 13 |
| *Civil Aeronautics Board* v. *State Airlines*, 338 U. S. 572 | 13 |
| *Coastal Bend Television Corp.* v. *United States*, 234 F. 2d. 686 | 7 |
| *Hotch* v. *United States*, 212 F. 2d 280 | 12 |
| *Logansport Broadcasting Corp.* v. *United States*, 210 F. 2d 24 | 13 |
| *Sangamon Valley Corp.* v. *United States*, 255 F. 2d 191, certiorari granted, remanded, 358 U.S. 49 | 4 |
| *Springfield Television Broadcasting Corp.* v. *United States*, 259 F. 2d 170, certiorari denied, 358 U.S. 930 | 4 |
| *Van Curler Broadcasting Corp.* v. *United States*, 236 F. 2d 727, certiorari denied, 352 U.S. 935 | 13 |

Cases—Continued

| | Page |
|---|---|
| *Winnebago Television Corp.* v. *United States*, 258 F. 2d. 163, certiorari denied, 358 U.S. 930 | 4 |
| *WIRL* v. *United States*, 253 F. 2d 863, certiorari granted, remanded, 358 U.S. 51 | 4 |

Statutes and regulations:

| | |
|---|---|
| Administrative Procedure Act, 60 Stat. 237, Section 4, 5 U.S.C. 1003 | 2, 5, 9, 10 |
| Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*: | |
| Section 303(f) | 4 |
| Section 316 | 4, 8 |
| Rules and Regulations of the Federal Communications Commission, Section 3.606(b), 47 C.F.R. 3.606(b) | 3 |

Miscellaneous:

| | |
|---|---|
| Federal Communications Commission Public Notice 33663, Report No. 2875 | 5–6 |
| 20 F.R. 2197 | 7 |
| 20 F.R. 8501 | 7 |
| 21 F.R. 4958 | 4, 6, 9 |
| 21 F.R. 4972 | 5–6, 9 |
| 21 F.R. 8196 | 8 |
| 22 F.R. 1499 | 3 |
| 11 Pike & Fischer, Radio Regulations 909, 911 | 7 |

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## OPINIONS BELOW

The opinion of the court below (Pets. O. & M. App. 1a)[1] is reported at 262 F. 2d 702. The decision and

[1] References to the petition in Case No. 885 are designated "Pet. O" and to the petition in Case No. 889 as "Pet. M."

order of the Federal Communications Commission is reported at 22 F.C.C. 382, and its decision denying reconsideration is reported at 23 F.C.C. 49.

## JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the actions of the Commission, was entered on December 18, 1958. Rehearing was denied on February 2, 1959. The petition for a writ of certiorari in No. 885 was filed on May 1, 1959; in No. 889 on May 4, 1959. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 5 U.S.C. 1040.

## QUESTION PRESENTED

Whether the court below properly determined that the Notice of Proposed Rule Making published in this proceeding was sufficient, under Section 4 of the Administrative Procedure Act, to support the order of the Commission reallocating television Channel 9 from commercial use in Hatfield, Indiana, to non-commercial educational use in Evansville, Indiana.

## STATUTE INVOLVED

The pertinent provisions of the Administrative Procedure Act (60 Stat. 238, 5 U.S.C. 1003) are set forth in the petitions at p. 3.

## STATEMENT

These cases involve separate petitions to review a rule-making action of the Federal Communications Commission switching VHF Television Channel 9 from Hatfield, Indiana, to Evansville, Indiana. No. 885 is brought jointly by Owensboro On the Air, Inc., and Owensboro Publishing Company ("Owensboro"), competing applicants for a commercial television sta-

tion on the Hatfield Channel 9 assignment. No. 889 is brought by Douglas H. McDonald, Trustee for Evansville Television, Inc., permittee of a television station on Channel 7 in Evansville, for whom McDonald was substituted as a party by order of the Court of Appeals dated April 21, 1959. Since this petitioner, throughout both the proceedings before the Commission and in the court below, went by its former name, it is referred to herein as "Evansville TV."

On March 1, 1957, the Federal Communications Commission, after full rule-making proceedings, amended Section 3.606(b) of its Rules (47 C.F.R. 3.606(b)), comprising a nationwide allocation of television channels, by transferring very high frequency (VHF) Channel 9 from commercial use in Hatfield, Indiana, to non-commercial, educational use in Evansville, Indiana; removing the educational reservation on ultra high frequency (UHF) Channel 56 and transferring it from Evansville to Owensboro, Kentucky (to serve Hatfield as well); and substituting Channel 78 for UHF Channel 31 in Tell City, Indiana (J.A. 15–37,[2] 22 F.C.C. 382, 22 F.R. 1499). The Commission also determined that it would serve the public interest to shift VHF Channel 7 from Evansville to Louisville, Kentucky, and to substitute UHF Channel 31 in Evansville (J.A. 34). However, since Evansville TV is an outstanding permittee on Channel 7 in Evansville, the Commission did not make the latter reallocations final but instead ordered Evansville TV to show

[2] References to the printed Joint Appendix below are designated "J.A."; those portions of the administrative record filed with the Court but not printed are designated "R."

cause, pursuant to Sections 303(f) and 316 of the Communications Act of 1934, as amended (47 U.S.C. 303(f) and 316), why its permit should not be modified to specify operation on UHF Channel in lieu of VHF Channel 7 (J.A. 34).

The instant reallocation actions were among a series of "deintermixture" proceedings undertaken by the Commission in an effort to improve opportunities for effective competition among a greater number of stations in individual areas pending some long-range solution to the nationwide UHF–VHF problem. See Report and Order in Docket 11532, June 26, 1956 (21 F.R. 4958).[3] The Commission here determined that the public interest would be served by making the Evansville area all UHF upon the basis of findings that (1) Channel 7 in Evansville and Channel 9 in neighboring Hatfield were the only VHF channels allocated within 75 miles of Evansville, (2) two UHF stations were already in operation in the Evansville area, (3) the terrain is favorable for UHF opera-

[3] See also *Springfield Television Broadcasting Corp.* v. *United States*, 259 F. 2d 170 (C.A.D.C.), certiorari denied, 358 U.S. 930; *Winnebago Television Corp.* v. *United States*, 258 F. 2d 163 (C.A.D.C.), certiorari denied, 358 U.S. 930; *WIRL* v. *United States*, 253 F. 2d 863 (C.A.D.C.), certiorari granted, remanded on other grounds, 358 U.S. 51; *Sangamon Valley Corp.* v. *United States*, 255 F. 2d 191 (C.A.D.C.), certiorari granted, remanded on other grounds, 358 U.S. 49. The circumstances which led this Court to grant certiorari and remand in the *WIRL* and *Sangamon* cases are not present in the instant case. The court below directed the parties to inform it as to the possible existence of circumstances such as caused this Court to remand in the *WIRL* case. All the parties assured the court below that there are no such circumstances here present. (Pet O. App., 5a).

tions, (4) a high percentage of television sets in the area has been converted for UHF reception, and (5) no significant number of people would lack television service if additional UHF channels were substituted for the commercial VHF channels in the Evansville area, and such loss as might occur would in large part be offset by the population which would gain a first service through the reassignment of Channel 7 to the predominantly VHF Louisville, Kentucky area (J.A. 26–29). The Commission concluded, upon the basis of its experience in other markets, that deletion of the two commercial VHF channels would improve the opportunity for effective competition among a greater number of television stations in the Evansville area, and that the transfer of Channel 7 to Louisville would similarly benefit that area (J.A. 29).

The Commission rejected contentions by petitioners that the Channel 9 move was beyond the scope of the rule making proceeding under Section 4 of the Administrative Procedure Act, because the Notice of Proposed Rule Making contained no express reference to that channel (J.A. 31–33). The Notice (June 26, 1956) proposed to deintermix Evansville by reserving Channel 7 for educational use and removing the educational reservation on Channel 56 (J.A. 1–2, 21 F.R. 4972).[4] It further specified (*ibid.*):

[4] In a Public Notice released simultaneously, the Commission stated that it was proposing to make "Evansville all commercial operation UHF by making only present VHF channel 7 educational instead of commercial and removing present educational reservation from 56, thus giving Evansville Channels 50, 56, and 62 for commercial use" (F.C.C. Public Notice 33663, Report No. 2875). The Public Notice on its face

> Any interested party who is of the view that the proposed amendment should not be adopted, or *should not be adopted in the form set forth herein,* may file with the Commission on or before September 10, 1956, a written statement setting forth his comments. * * * [Emphasis added.]

The Notice also referred (21 F.R. 4973) to the Commission's Report and Order in Docket No. 11532 (*supra*), and specifically directed the attention of parties submitting comments to the matters discussed in paragraph 31 of that Report (21 F.R. 4958, 4962).[5]

Among the parties filing public comments or counterproposals were Premier Television, Inc. (permittee of a UHF station in Evansville), WEHT, Inc. (permittee of a UHF station in nearby Henderson, Kentucky), and Mid-America Broadcasting Corporation (permittee of a UHF station in Louisville, Kentucky). Premier and WEHT urged that the "Evansville, Indiana, market" be made exclusively UHF by

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refers to the fact that Channel 7 was the "only present VHF channel" in Evansville and, contrary to the suggestion of petitioners Owensboro (Pet. O. 4), does not state that only Channel 7 was involved in the proceeding.

[5] In paragraph 31 of Report and Order in Docket No. 11532, the Commission stated with respect to interim action that "a basic choice in many markets at this time lies between the elimination of VHF channel assignments to create improved opportunities for UHF broadcasting and, alternatively, the assignment of additional local VHF channels" (21 F.R. 4958, 4962). While pointing out that it was not possible to formulate any rigid formula because of the "widely varying circumstances in individual markets and the numerous factors which bear on the choice of techniques in any individual community or area," the Commission set forth general criteria which would be considered (*ibid.*).

reserving Channel 9, as well as Channel 7, for educational use in the Hatfield-Evansville area (J.A. 11, R. 297). Mid-America proposed that Channel 7 be reallocated to Louisville, that Channel 9 be reallocated or deleted from Hatfield, and that additional UHF channels be allocated to Evansville and Hatfield (J.A. 9–10).*

On July 13, 1956, subsequent to the Notice of Proposed Rule Making in the instant proceeding, Mid-America filed a Petition for Rule Making in the Nature of Counterproposals to the Commission's Proposal, requesting that Channel 7 be deleted from Evansville and reassigned to Louisville (J.A. 3). The Commission, on October 22, 1956, denied this petition asserting that Mid-America's proposals would be considered as counterproposals in the pending Evansville deintermixture proceeding, and that it did not believe

* Each of these parties had previously made similar proposals in pleadings filed with the Commission. In 1954, Premier and Ohio Valley Television Company (the corporate predecessor of WEHT) requested rule making to reserve Channel 7 for educational use. The Commission denied their petitions on the ground, *inter alia*, that reservation of Channel 7 for educational use would not effectively deintermix the Evansville area in view of the Channel 9 assignment 21 miles away (11 Pike & Fischer, Radio Regulations 909, 911). In February 1955, Premier and Ohio Valley petitioned for reconsideration requesting deletion of both commercial VHF assignments. The Commission instituted a rule making proceeding (in which Mid-America participated) to deintermix the Evansville-Hatfield area (20 F.R. 2197), but on November 10, 1955, terminated the proceeding before any decision on the merits simultaneously with the institution of Docket No. 11532 dealing with the UHF–VHF problem on a nationwide basis (20 F.R. 8501). See *Coastal Bend Television Corp.* v. *United States*, 234 F. 2d 686 (C.A.D.C.).

that "there is any need to institute further rule making or to amend the notice of rule making in this proceeding" (21 F.R. 8196).

Moreover, on August 24, 1956, Evansville TV filed a petition requesting withdrawal of the instant notice of proposed rule making on the ground that it was entitled, as permittee of Channel 7, to a full evidentiary hearing under Section 316 of the Communications Act (J.A. 3–5). The Commission denied this petition on November 28, 1956 (released December 3, 1956), basically for reason of prematurity, noting (J.A. 7–8):

> * * * The Notice of Proposed Rule Making in Docket No. 11757, to which petitioner objects, is merely a proposal, which may or may not be adopted in the form proposed. Only after consideration of the requested comments and any counterproposals that may be submitted will we be in a position to judge the proposal on its merits, both legal and factual.

The comments and counterproposals, including those involving Channel 9 and various UHF channels not specifically mentioned in the Notice of Proposed Rule Making, were filed on December 3, 1956.[1] On December 28, 1956, Evansville TV filed a lengthy

[1] On December 12, 1956, various counsel appearing in 14 deintermixture proceedings, including counsel for Evansville TV, filed a petition for extension of time for filing reply comments in each of these proceedings on the ground, *inter alia*, that the comments "include counterproposals suggesting channel changes not included in the Notices of Proposed Rule Making and not heretofore revealed in earlier pleadings" (R. 436). The Commission granted a ten-day extension to December 28, 1956 (R. 440–441).

reply comment which challenged the Channel 9 counterproposals both under Section 4 of the Administrative Procedure Act and on the merits (R. 712–736). On the same date, Owensboro moved to strike the Channel 9 counterproposals but did not discuss the merits (J.A. 13–15).

In its Report and Order of March 1, 1957, the Commission noted that the Notice of Proposed Rule Making (21 F.R. 4972, 4973) had referred to the Report and Order in Docket 11532 (21 F.R. 4958) which treated at some length the need for *area* deintermixture (21 F.R. at 4962). It found that Evansville and Hatfield are in the same area, since they are only 21 miles apart and a station in one would place a Grade A signal over the other (J.A. 32). The Commission concluded that the notice was sufficient, under the circumstances of this case, to encompass Channel 9 particularly in view of the fact that the parties had actual notice that Channel 9 was involved and ample opportunity to submit comments in reply to the counterproposals (J.A. 32–33). The Commission accordingly denied the Owensboro motion to strike the counterproposals (J.A. 31–33).

On March 29, 1957, Evansville TV, but not Owensboro, filed a petition for reconsideration again challenging the Commission's order with respect to Channel 9 both procedurally and on the merits (J.A. 37–52). The Commission denied reconsideration and reaffirmed its rule making actions in a Memorandum Opinion and Order released on June 24, 1957 (J.A. 52–55).

On appeal, the Court of Appeals (Judge Fahy dissenting) affirmed the Commission's actions (Pet. O. App. 1a–16a). The court upheld the Commission's determination that deintermixture of the Evansville area would serve the public interest, as "valid" and within the Commission's "competence" (Pet. O. App. 11a–12a). The court further held, "particularly on the facts of this case", that Channel 9 was within the scope of the proceeding since there had been both actual notice of the Channel 9 counterproposals and a sufficient description in the Notice of Proposed Rule Making of the subjects and issues involved, as required by Section 4(a) of the Administrative Procedure Act (Pet. O. App. 12a–14a). Petitions for rehearing *en banc* were unanimously denied (Judge Miller not participating) (Pet. O. App. 17a).

## ARGUMENT

The question presented is narrow, turns on the particular facts, and lacks general importance.

Petitioners' principal contention (Pet O. 8–20; Pet. M. 9–16, 22) is that the decision below will have a widespread impact on Commission and other agency rule making proceedings by exempting counterproposals from the notice requirements of the Administrative Procedure Act. This overlooks the statement of the court below that it had "no intention whatever of accepting a Commission's plan of convenience as a substitute for compliance with the rule making notice requirements of § 4 of the Administrative Procedure Act" (Pet. O. App. 12a). The Court of Appeals merely concluded (Pet O. App. 12a–14a) that the

Notice of Proposed Rule Making here was, under the circumstances, sufficient to apprise interested persons that consideration might be given to counterproposals involving shifts in other channels serving Evansville, and that the eventual Commission order involving Channel 9 was reasonably related to the deintermixture of Evansville proposed by the Notice. Nothing in this determination, based "particularly on the facts of this case" (Pet. O. App. 12a), purports to establish any general rule that counterproposals can expand a rule making proceeding beyond the area reasonably encompassed in the notice of proposed rule making.[8] As petitioners Owensboro admit (Pet O. 19), the Commission customarily issues a notice of further rule making where it is necessary to afford interested persons an opportunity for full participation.

Contrary to petitioners' further contention (Pet. O. 12–17; Pet. M. 16–18, 21–22), the decision below does not rest on any finding that the notice requirements of the Administrative Procedure Act were here met because petitioners had actual notice in lieu of publication or because they had an opportunity to petition for reconsideration of the Commission's order. The court's holding is that the Notice itself contained a sufficient "description of the subjects and the issues involved as required by § 4(a)" (Pet. O. App. 12a). In resolving any possible ambiguity in the

[8] Judge Fahy, dissenting, disagreed only with the factual determination that the instant Notice was sufficient, and indicated that any deficiency might have been cured had the Commission announced its construction of the Notice by ruling on the procedural objections of the Owensboro petitioners prior to issuance of the March 1, 1957, order (Pet. O. App. 16a).

Notice in favor of its sufficiency, the Court of Appeals properly made a "realistic appraisal of the background for the action of the Commission" (Pet. O. App. 12a–13a), including the fact that petitioners were aware of the potential involvement of Channel 9, both from the earlier history of the deintermixture proceedings involving the Evansville area and from their actual knowledge of the counterproposals, and had ample opportunity, by way of reply comments or petitions for reconsideration, to meet the specific arguments relating to Channel 9 advanced in the counterproposals.

Finally,[*] there is no conflict between the decision below and *Hotch* v. *United States,* 212 F. 2d 280 (C.A. 9). As the court below pointed out (Pet. O. App. 14a, n. 13), *Hotch* was not concerned with the sufficiency of a notice of rule making which had been published in the Federal Register "since neither the proposed regulation nor the regulation itself * * * was ever published" (212 F. 2d at 284). The absence of any publication prior to the issuance of a regulation making certain acts criminal was held in *Hotch* to preclude a conviction. The holding here as to the sufficiency of a published notice is clearly distinguishable and in accord with applicable authority. *Logansport Broadcasting Corp.* v. *United States,* 210 F.

[*] Evansville TV's additional argument—that the Commission decision to remove Channel 9 from commercial use in the area is invalid because of the lack of finality of the proposed Channel 7 shift to Louisville (Pet. M. 23)—was rejected by the court below without discussion (Pet. O. 12a) and clearly presents no question of importance warranting further review.

2d 24, 28 (C.A.D.C.); *Van Curler Broadcasting Corp.* v. *United States*, 236 F. 2d 727 (C.A.D.C.), certiorari denied, 352 U.S. 935. Cf. *American Trucking Associations* v. *United States*, 344 U.S. 298, 307; *Civil Aeronautics Board* v. *State Airlines*, 338 U.S. 572; *City of Dallas* v. *Civil Aeronautics Board*, 221 F. 2d 501 (C.A.D.C.), certiorari denied, 348 U.S. 914.

## CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
*Solicitor General.*

ROBERT A. BICKS,
*Acting Assistant Attorney General.*

RICHARD A. SOLOMON,
*Attorney.*

JOHN L. FITZGERALD,
*General Counsel,*

MAX D. PAGLIN,
*Assistant General Counsel,*

RUTH V. REEL,
*Counsel,*
*Federal Communications Commission.*

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